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THE APPOINTMENT OF MR. JUSTICE HARLAN*

Recent activity of the Supreme Court in the civil rights field has brought recognition to John Marshall Harlan, who for three decades forcefully expounded, often unaccompanied, a doctrine of judicial protection of civil liberties.¹ Renascent interest, naturally focused on his constitutional opinions, has produced relatively slight consideration of other aspects of his public career.² One colorful phase was his confirma-

* This paper was completed as part of the requirements for a course in Legal History by Ellwood W. Lewis, 3d year student, Indiana University School of Law.

The writer is indebted to Professor John P. Frank, Yale Law School, for bringing to the attention of the *Indiana Law Journal* the master letter from Harlan to James Beck, see pp. 60-68 *infra*, and thus encouraging the writing of this article. Acknowledgment is due the University of Louisville Law School and Dean A. C. Russell for permitting publication of letters located in their Harlan collection. Too, The National Archives, The Louisville Public Library and the Filson Club of Louisville generously made available their papers and documents.

Citations which are not otherwise credited are from the Records of the 45th Congress, United States Senate, Judiciary Committee.

1. For recent evaluations of Harlan's judicial performance see Waite, *How "Eccentric" was Mr. Justice Harlan?*, 37 MINN. L. REV. 173 (1953); Watt and Orlikoff, *The Coming Vindication of Mr. Justice Harlan*, 44 ILL. L. REV. 13 (1949); Fairman, *The Supreme Court and the Constitutional Limitations on State Governmental Authority*, 21 U. OF CHI. L. REV. 40, 41 (1953). For earlier writings concerning his judicial career see Knight, *The Dissenting Opinions of Justice Harlan*, 51 AM. L. REV. 481 (1917); Clark, *The Constitutional Doctrines of Justice Harlan*, 33 JOHNS HOPKINS UNIVERSITY STUDIES IN HISTORICAL AND POLITICAL SCIENCE 415 (1915). Harlan, born in Boyle County, Kentucky, on June 1, 1833, was reared in a "political-legal" atmosphere, his father, James Harlan, being a noted Whig attorney. John Harlan was admitted to the Kentucky bar in 1853 after being graduated from Centre College and Transylvania Law School. His only judicial position prior to his elevation to the Supreme Court was that of Franklin County judge in 1858; he was state Attorney General from 1863 to 1867. BIOGRAPHICAL ENCYCLOPAEDIA OF KENTUCKY 31-32 (Armstrong, J. M., 1878).

2. Only three articles concern themselves to any degree with the pre-Court career of Harlan. See Frank, *The Appointment of Supreme Court Justices: Prestige, Principles and Politics*, 1941 WIS. L. REV. 172, 204-210 (1941); Farrelly, *John M. Harlan's One-Day Dairy, August 21, 1877*, 24 FILSON CLUB HISTORY QUARTERLY 158 (1950); Hartz, *John M. Harlan in Kentucky, 1855-1877*, 14 FILSON CLUB HISTORY QUARTERLY 17 (1940). Each reaches a different conclusion regarding Harlan's controversial confirmation. Frank, *supra* at 209, remarks, "Edmunds collected whatever he could find critical of Harlan. This caused the delay in confirmation." Farrelly, *supra* at 158, begins his article by observing, "Although three-quarters of a century has elapsed since John M. Harlan was appointed to the United States Supreme Court, conflicting opinion still exists as to the circumstances surrounding his nomination." Hartz, *supra* at 40, hurriedly concludes an otherwise thorough account of Harlan's pre-Court political career: "It was doubtless with a hardened reaction that he heard news of opposition to his confirmation by some Republicans who brought out his one-time opposition to Negro emancipation; yet his championship of Republicanism in Kentucky had won the admiration of influential Republicans everywhere and he was easily confirmed."

tion as Associate Justice in 1877, which was delayed forty-five days while the merits of his appointment became clouded by the political controversy so prevalent in the post-Civil War era.³

Harlan's name came before Congress on October 16,⁴ one day after it convened in special session called by President Rutherford B. Hayes. During the seven months that had elapsed since his inauguration, Hayes had given indication of his intention to adopt a conciliatory policy toward the South.⁵ His position, already insecure as the result of the Hayes-Tilden election controversy, was thus made particularly precarious by the split between the moderate Republicans and those committed to a harsh reconstruction of the Southern states. The Radical leaders in Congress, men like Conkling, Blaine, Cameron and Logan, were determined to retain the executive powers and initiative which their predecessors, Charles Sumner and Thaddeus Stevens, had usurped during the terms since Lincoln's assassination.⁶ Therefore, despite the need for army

3. Such delay, though not unique, happens seldom; up to 1937 only six confirmations had been delayed longer. Two-thirds of the Supreme Court confirmations have been within ten days. EWING, *THE JUDGES OF THE SUPREME COURT, 1789-1937* 19 (1938). Though extended delays in confirmation are few, attacks upon nominees are not necessarily less vehement than those against Harlan. A contemporary protest against the recent appointment of Governor Earl Warren, California, as Chief Justice shows similarity to attacks upon Harlan. "Warren is neither a great lawyer nor student of law. He is not a great judge. He is a politician. Quite obviously he was appointed as a politician and not for his judicial qualifications." *The Indianapolis Star*, Oct. 1, 1953, p. 16, col. 1.

4. 21 SEN. J. 1877-1879 44 (1901).

5. In particular, Hayes had recalled federal troops throughout the South and thus allowed governments representing the Democratic whites who had what wealth, standing and prestige there was remaining in those states to come into power. II WILLIAMS, *THE LIFE OF RUTHERFORD BIRCHARD HAYES* 33-68 (1928) (hereafter cited as WILLIAMS, *LIFE*). This action was more than mere satisfaction of a campaign promise and took considerably more courage than did Hayes' adoption of such a policy in his letter of acceptance to the Republican Convention and in his inaugural address. I WILLIAMS, *LIFE* at 444, 462, II WILLIAMS, *LIFE* at 7-8.

6. With the subjugation of Andrew Johnson and the substitution of the harsh Congressional reconstruction for his "softer" plan, Thaddeus Stevens, Representative from Pennsylvania, began his virtual rule of the United States. Under the Grant administration Stevens' Radical followers perpetuated their control over Congress and influence over the President. Later leaders like Blaine and Conkling consolidated their hold through extensive control of patronage. Grant, for the most part, remained apathetic to this encroachment on his appointive power; nor did he resist Radical exercise of policy-making power toward the South. Consequently, when Hayes, a compromise presidential candidate of doubtful influence, affirmed with action his demands for reform, the Radicals lashed back, intent on retaining their extra-Constitutional position. II MORISON AND COMMAGER, *THE GROWTH OF THE AMERICAN REPUBLIC* 31-78 (1950).

Though this paper focuses on the Hayes-Radical clash over a policy toward the South, the entrenchment over patronage, and ultimately, over control of the Republican party, must not be disregarded. This is made more pointed by Hayes' diary entry on April 22, 1877: "Now for civil service reform. Legislation must be prepared and executive rules and maxims. We must limit and narrow the area of patronage. We must diminish the evils of office-seeking. We must stop interference of federal officers with elections. We must be relieved of congressional dictation as to appointments."

funds which the previous Congress had failed to appropriate, Hayes determined to postpone military payments and to delay calling a special session, in order to give his Southern policy more time to bring about peace and stability and thereby to gain public support.⁷ For Hayes the session meant a chance to regain prerogative; for the Radicals it was another opportunity to reduce the power and prestige of the executive.

With the lines of conflict thus drawn it was inevitable that Harlan would be considered a Hayes man by the Radicals. Instrumental in furthering Hayes' presidential ambitions, Harlan had become progressively more identified with him since the inauguration. As the head of the Kentucky delegation to the Republican national convention of 1876, Harlan actively urged the nomination of that State's favorite son, Benjamin Bristow.⁸ But when the seventh ballot had reduced the

III WILLIAMS, *DIARY AND LETTERS OF RUTHERFORD B. HAYES* 430 (1924) (hereafter cited as WILLIAMS, *DIARY*). Reform in civil service must in fact have been more adverse to the Radicals' interests than a moderate Southern policy, for with reform would come a loss of influence and strength within the party maintained through patronage. Undoubtedly, Harlan's appointment could be portayed in terms of a clash over "spoils" since the evidence shows that Hayes made the appointment more on personal reflection than upon consultation with Congressional leaders. After naming the members of his cabinet, Hayes noted in his diary, "The chief disappointment among the influential men of the party was with Conkling, Blaine, Cameron, Logan, and their followers. They were very bitter." *Id.* at 426. And while Harlan's name was still in committee Hayes remarked: "The most bitter opposition arises from the apprehension that the course of the Administration will deprive Congressmen of all control and share of the patronage of the Government." *Id.* at 449. But since the office of Supreme Court Justice is not connected with civil service, the conflict seems better depicted in light of the broad prerogative clash, with attention centered particularly around the intricate Southern problem. FISH, *THE CIVIL SERVICE AND THE PATRONAGE* 186-217 (1905); ROBINSON, *THE EVOLUTION OF AMERICAN POLITICAL PARTIES* 167-192 (1924).

7. WOODWARD, *REUNION AND REACTION* 203, 225 (1951). Since certain members of the Cabinet "... found legal objections to all plans for raising and disbursing money without appropriations," Hayes decided to call an extra session of Congress on June 4. III WILLIAMS, *DIARY* at 428-9 (1924). A midsummer session was avoided by suspending army payments for the first quarter of the new fiscal year. By October Hayes hoped for calmer judgment not only toward his Southern policy but toward his civil service policy and fiscal measures. II WILLIAMS, *LIFE* at 81.

8. In nominating Bristow, Harlan said of his law partner: "I need only say to-day, that he was reared in that school of politics which taught me and you that these United States do not constitute a league, but a nation." JOHNSON, *OFFICIAL PROCEEDINGS OF THE NATIONAL REPUBLICAN CONVENTIONS OF 1868, 1872, 1876 & 1880* 290-2 (1903). Available correspondence with Governor Chamberlain of South Carolina indicates that Harlan had diligently aligned support for Bristow.

"I am grateful for your approval of my public course and for your interest in our cause. What you say of the causes of the decline of the Republican party in the South, and of the means of its restoration to confidence and power, I *know* to be true. . . .

"... I agree with you that the nomination and election of Bristow would bring us peace and political success,—as well as success of every other kind,—here in the South

"... I think we shall have a majority for Bristow" Chamberlain to Harlan, May 10, 1876, Harlan Papers, Miscellaneous Correspondence, 1870-1876, University of Louisville Law School, Louisville, Kentucky.

effective choice to Hayes or Blaine, he maneuvered the entire delegation into the Hayes camp with the critical votes necessary for nomination.⁹ The ensuing campaign was bitter and the outcome close, depending finally on the electoral commission's decision as to which of two sets of electors from each of the four states of Louisiana, South Carolina, Florida and Oregon were entitled to cast votes for President.¹⁰

Hayes' problem was not settled when the Republican electors were accepted, for, as the new commander in chief of the army, he was immediately entangled in the same dispute on the local level.¹¹ In the three Southern states, still occupied by federal troops, Republican and Democratic candidates were claiming victory in the contests for state offices.¹² Desiring to remove troops from the South,¹³ Hayes had nevertheless to recognize that the civil stability which assured his

9. JOHNSON, *op. cit. supra* note 8, at 326-7; Farrelly, *supra* note 2, at 159.

10. The accounts regarding the most disputed national election in this country's history are voluminous, the criticism bitter, and the analyses controversial. The electoral commission was composed of five Senators, five Representatives and five Supreme Court Justices. There were seven Republicans and seven Democrats selected to serve on the commission when the last member was named. He was Justice Joseph P. Bradley, and the full responsibility for "naming the next President" as well as the praise and censure thereof fell to him. See I WILLIAMS, *LIFE* at 491-540 (1928); III WILLIAMS, *DIARY* at 374-423; MARBLE, *A SECRET CHAPTER OF POLITICAL HISTORY* (1878); WOODWARD, *op. cit. supra* note 7, at 155-6; NEW YORK TRIBUNE, *THE CIPHER DISPATCHES*, Tribune Extra No. 44 (1879); Bone, *Louisiana in the Disputed Election of 1876*, 14 THE LOUISIANA HISTORICAL QUARTERLY 408, 549 (1931), and 15 THE LOUISIANA HISTORICAL QUARTERLY 92, 234 (1932); II MORISON AND COMMAGER, *op. cit. supra* note 6, at 76-78, 836 (1950).

11. Grant's policy (or that of the Radicals) had been to retain federal troops in the South to enforce reconstruction policies and to support the unpopular Republican state governments. It is possible that he had changed his attitude by 1877 and may have, had the national election dispute been terminated earlier, intended to withdraw the troops. Since only two days in his term remained when the results were announced, he quite sensibly and expediently left the burden to Hayes. II WILLIAMS, *LIFE* at 33-4.

12. II WILLIAMS, *LIFE* at 34-5. The Florida Supreme Court decided in favor of the constitutionality of the Democratic "government," thereby settling the conflict in that State. Hayes through personal conferences with the rival "governors," settled the South Carolina dispute as the Republicans capitulated. *Id.* at 34-52.

13. On March 16 Hayes made this entry in his diary: "Different plans for Louisiana and South Carolina are offered:—1. A new election. 2. Lawful action of Legislatures. 3. Acknowledge Packard and Chamberlain [the respective Republican "governors"], and leave them to their own state remedies. 4. Withdraw troops and leave events to take care of themselves. Here I am too crowded with business to give thought to these questions." III WILLIAMS, *DIARY* at 428. Four days later Hayes and a majority of the Cabinet agreed that it was unwise to sustain a state government by force. Hayes wrote, "I incline to think that the people will not now sustain the policy of upholding a State Government against a rival government, by the use of the forces of the United States. If this leads to the overthrow of the *de jure* government in a State, the *de facto* government must be recognized." *Ibid.* On March 23 Hayes made his position more explicit: "It is not the duty of the President of the United States to use the military power of the Nation to decide contested elections in the States. He will maintain the authority of the United States and keep the peace between the contending parties. But local self-government means the determination by each State for itself of all questions as to its own local affairs." *Id.* at 429.

Presidency did not prevail in the South where local offices were much disputed.¹⁴ In Louisiana, where the Packard Republican "legislature" sat in the capital building, the doors guarded by federal soldiers, it was at least probable that withdrawal of the army would be followed by popular action to seat the Nicholls Democratic "legislature" meeting in Odd Fellows Hall not far distant.¹⁵ Given his fundamental purpose to withdraw the troops, Hayes had to promote the establishment of a stable state government, even though that government was Democratic and its acceptance might cast doubt on the validity of his own election by Republican electors.¹⁶

At a Cabinet meeting on March 20 it was decided that a commission should be dispatched to Louisiana.¹⁷ As communicated to them by Secretary of State William Evarts the commission's task seemed innocuous enough. It was not to include "any examination into or any report upon the facts of the recent State election But it is important that the President should know what are the real impediments to a regular, legal, and peaceful procedure by which the anomalies in the government in Louisiana may be settled without the use of the military."¹⁸ The commission was to take no action, merely "collect public opinion" and "report to the President."¹⁹ Harlan was called upon to serve on this five-man commission.²⁰ No sooner had the group begun its task than its members fell victim to ruthless accusations and derogations by the

14. There is little doubt that the American people were enraged over the machinations accompanying the election of 1876, since in fact the decision as to whom should be President was taken from their hands by the political parties. Yet the suggestion that a civil war would have precipitated had it not been for the magnanimity of Tilden or the concessions of Hayes is at least controversial. WARMOTH, *WAR, POLITICS AND RECONSTRUCTION* 238-9 (1930); WOODWARD, *op. cit. supra* note 7, at 150-215. But acquiescence in a peaceful solution is best attributed to "the good sense of the American people." II MORISON AND COMMAGER, *op. cit. supra* note 6, at 78.

15. II WILLIAMS, *LIFE* at 35. "Packard, who was in a state of virtual siege in the old St. Louis Hotel, now used as a State House, beyond the four walls of which he was unable anywhere in the State to make his authority respected, stood stubbornly on his asserted legal rights. Nicholls and his Legislature insisted now only on their rights, which, by their interpretation of the constitution and law, were valid, but also on the fact that they were actually exercising all the powers of government, with the acquiescence, approval and voluntary support of the great body of the intelligent and taxpaying classes." *Id.* at 57.

16. ". . . Packard received a larger number of votes than some of the Hayes electors and therefore had stronger claim to the governorship of Louisiana than Hayes had to the Presidency of the United States. . . ." WOODWARD, *op. cit. supra* note 7, at 218; see also II WILLIAMS, *LIFE* at 38.

17. III WILLIAMS, *DIARY* at 428.

18. Bone, *Louisiana in the Disputed Election of 1876*, 15 THE LOUISIANA HISTORICAL QUARTERLY 234, 256 n.316 (1932); II WILLIAMS, *LIFE* at 54-6.

19. *Ibid.*

20. Harlan's name was not among those first suggested for the commission. At the Cabinet meeting the next day his name replaced others previously suggested. III WILLIAMS, *DIARY* at 428-9.

parties, the press and the public. Their iniquities were said to be, among other things, taking and giving bribes which tended to consolidate the Nicholls legislature.²¹ In any event, during the fortnight that the commission was in New Orleans, a sufficient number of members of the Packard legislature had seceded from that body and joined the Nicholls legislature to give this house a quorum of members the validity of whose status was agreed upon by both factions.²² At the end of that period the commission could thus telegraph this fact to the President and recommend that the troops be withdrawn.²³ Five days later, on April 24, federal troops withdrew from their positions protecting the Packard "government" and that faction "under compulsion" surrendered its claim to power.²⁴ The fact that Harlan and his fellow commissioners could hardly have been unaware that bribery had some influence on the shift of power, was apparently the strongest basis for the accusations.²⁵ Whatever the whole truth concerning this mission, Harlan had incurred the ire of the Radical Republicans in meriting the gratitude of Hayes.

21. The only conclusion clearly substantiated by the record is that the commission was soon aware that the only way in which one constitutional authority could be established was to consolidate the two legislative bodies so that one of them would have a quorum of members possessing unquestionable rights to their seats. II WILLIAMS, *LIFE* at 59. The moving force behind the actual consolidation was Andrew J. Kellar, editor of the Memphis *Avalanche*, and close friend of Hayes, who though not on the commission accompanied them and assisted in their work. "In this delicate work, accomplished largely by the use of money, Kellar found the gentlemen of the New Orleans Cotton Exchange quite co-operative. Also of great aid in the same work was the Louisiana State Lottery Company." In a letter to William Henry Smith, Kellar explained the purpose of his actions was "that many things necessary to be done, but which the commission cannot do, must be accomplished in order to reach results that will be accepted by public opinion." WOODWARD, *op. cit. supra* note 7, at 220. The support of the negroes in the Packard Legislature had to be purchased, but the members of the commission did not participate in this transaction. The Louisiana Lottery Company furnished the money to buy the negroes for which the Nicholls legislature granted the Lottery a twenty-five year charter. McCLURE, *OUR PRESIDENTS* 267-8 (1905). An eye-witness to the disintegration of the Packard legislature asserts that Kellogg, the Republican candidate for Senator, was "bought off" with a U. S. Senate seat (See p. 74 *infra*) and Packard with a consul-generalship. WARMOTH, *op. cit. supra* note 14, at 239.

22. Though a part of this "... drift over to the Nicholls body." can be attributed to the passage of money, other legislators realigned themselves for fear that federal support of the Packard legislature could not long be counted on. II WILLIAMS, *LIFE* at 59.

23. *Id.* at 60.

24. *Id.* at 61. "I waive none of my legal rights," he [Packard] said, 'but yield only to superior force.' . . . And with this noble advice slipping easily from his pen, the last of the carpetbaggers made his bow to the public and passed into obscurity." *Ibid.*

25. Accusations that Harlan (and the other commissioners) sanctioned this use of money later plagued his confirmation. He is said to have admitted knowing that "... \$40,000 had been raised by Nicholls friends. . . ." Painter to Edmunds, October 4, 1877; Boynton to Judiciary Committee, November 13, 1877.

It should be remembered that the commission was not under a duty to prevent or even discourage a shift in the Louisiana balance of power. They were only to report to Hayes which party seemed to be the most likely victor. After their return a letter from

Meanwhile, Justice David Davis had resigned from the Supreme Court to accept a senatorial post,²⁶ and Congress had adjourned without Hayes' having nominated a successor. Hayes' failure to designate a nominee for eight months provided ample time for considerable maneuvering by hopeful candidates and their sponsors.²⁷ As early as March 18, three days before Hayes named the Louisiana Commission, Supreme Court Justice Miller had confided to his brother-in-law, William Pitt Ballinger of Texas:

"The vacancy on our bench will not be filled until the Senate is in session again. I am well posted as to the Presidents [sic] feeling without having said a word to him. Caldwell and Wood[s] have been pressed on his consideration by more men of influence than any other nominees.²⁸ Judge Bruce of Alabama who is graduate of my law office had an interview three days ago with the President as I suppose to favour Wood[s]; but of that I am not sure. He told me however, that the President was hesitating between Harlan of Kentucky or possibly Bristow their interest being one, and a *real* Southern man, and in this latter sense he did not consider Wood[s] or Caldwell to meet the requirements. Now the difficulty of selecting a real Southern man is that all the men who before the Rebellion had made high reputation as lawyers are either dead or too old for the place.

"If a proper man can be found[,] the place ought to be filled with a lawyer familiar with civil code system of Louisiana and Texas. He ought also to come from that circuit. Where can a man be found more suitable under all the circumstances than yourself?"²⁹

Commissioner Wayne MacVeigh to Harlan indicates that they were so disturbed by the allegations of misconduct that they sought some exoneration in declining any compensation which might be forthcoming.

"... As to the matter of compensation to the commission it is absolutely clear to my mind that we ought not to accept anything large or small. I hope therefore that you will write to the others if you think it necessary and thereupon write a kind note to the Secretary referring to your former conversation and stating very explicitly that the members of the commission, do not desire, nor indeed would they feel themselves at liberty to accept any such compensation whatever." MacVeigh to Harlan, May 26, 1877, Harlan Papers, Miscellaneous Correspondence, 1877-1879, University of Louisville Law School, Louisville, Kentucky.

26. Justice Davis had served on the Supreme Court for fifteen years before being elected Senator from Illinois on January 25, 1877. He resigned as Justice on March 4, 1877. II WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 565 (1937).

27. Department of Justice records show that there were at least twenty-four contenders for this Supreme Court post. *Id.* at 565-6. Frank, *supra* note 2, at 206.

28. John H. Caldwell, Arkansas, and William B. Woods, Alabama, may be described as carpetbaggers. James A. Garfield, successor to Hayes, "... felt that he had never seen as many sincere recommendations as those which supported Woods." Frank, *supra* note 2, at 204-5.

29. FAIRMAN, *MR. JUSTICE MILLER AND THE SUPREME COURT* 352 (1939).

This letter, and others from Miller to Ballinger which are the best contemporary source describing the machinations of aspirants for the office, seems to present the considerations foremost in the mind of Hayes. It is probable that Hayes eliminated Northern candidates from consideration at the outset, for he is reported as saying that ". . . it seemed wrong that so large a part of the Union [the South] should be without a representative in that Court."³⁰ But quite apart from the objections suggested by Miller, Hayes had to remember that a "real Southern man" would inevitably be a Democrat. Such a nominee would alienate *all* the Republicans of Congress and not merely the Radicals.

Another factor of which Hayes must have been aware was the sentiment against unbalanced representation in terms of existing judicial circuits.³¹ In a letter to Ballinger on May 6, Miller wrote of a "casual conversation" with Chief Justice Waite in which William Hunt of New Orleans, Harlan, and his fellow Kentuckian, Benjamin Bristow were mentioned, these apparently being even at this early date the foremost contenders along with Ballinger. Miller quotes the Chief Justice as being ". . . decidedly opposed to all three of them. Thinks Hunt not up to the mark in ability; Bristow to[o] much aspiring and that it would be very unpolitic to fill the place from a circuit which now has two members of the court, and that this would give Davis' circuit just ground of complaint. I think if it is narrowed down to the men named by the President the C. Justice will say what he may properly say in your favour."³²

In the same letter Miller recounted a private conversation with Hayes at which time they discussed the same four men. Of the Kentuckians Miller thought ". . . both were fully up to the standard required both by native ability and professional attainments. That of the two Harlan was probably a man of the most vigorous intellect, while Bristow was believed to be if any different of the soundest judgment." Miller recalled that Hayes then alluded to ". . . Bristow's presidential aspirations" which "were to be feared . . ." Mr. Justice Miller concurred and ". . . made some very forcible remarks on the evils of presidential hopes in our court and especially how the present members of it

30. *Id.* at 355. Judge Drummond of Illinois was the only Northern contender listed by the Department of Justice; Frank, *supra* note 2, at 206-7.

31. The First, Second, Eighth and Ninth Circuits were represented by one Justice. There were two each from the Third and Sixth Circuits. Since there were three unrepresented Circuits, Harlan's appointment from the Sixth Circuit markedly unbalanced the representation. His first allotment on the Court was the Seventh Circuit. 98 U. S. vi (1878).

32. FAIRMAN, *op. cit.* *supra* note 29, at 358.

had felt the annoyance and misfortune of the thing in the case of Judge Davis and the late Chief Justice Chase."³³ This aversion to his political ambitions ultimately blocked Bristow's candidacy for the nomination.³⁴

Harlan, himself, had not yet reached a decision to seek judicial office. He had for some years entertained ambitions for the Attorney Generalship,³⁵ dedicating his remaining energies to soliciting a high position for Bristow; his friends, however, had judicial aspirations for him. In a letter dated May 12, 1877, Wayne MacVeigh, a fellow Louisiana commissioner, writes:

"I have put myself in the way of knowing which ideas prevail in reference to the succession to Judge Davis, and I think I discover persuasive signs of a desire to look much further South than Kentucky. The absence of any judge on the Supreme Bench from that section and the presence of *two* there [now] from the adjoining State to [yours] are felt to be very weighty considerations as against taking a third from Kentucky.

"As you well know I would be only too glad to see Bristow have anything he desired, but I really believe both for himself and the country it is better that his career should be political than judicial—And yet if the choice had fallen [just] now [or] should fall on your State I take it for granted the place could be offered to him.

"Now your career ought to be judicial. It is your ambition [and] if your life was [spared] I see not only great usefulness but great happiness also in it for you. Why not make up your mind to take the Circuit Judgeship of your own circuit

33. *Id.* at 357. WARREN, *op. cit. supra* note 26, at 563-5.

34. Hayes wrote in his diary that he intended not to appoint anyone from Grant's Cabinet, nor anyone with presidential aspirations. III WILLIAMS, *DIARY* at 419.

35. Since Harlan and Senator Morton of Indiana seemingly had each other's interests at heart (see note 72 *infra* and accompanying text), it was natural for Harlan's friends to approach Morton after the national election in 1872 suggesting that he intercede before Grant on Harlan's behalf for the Attorney Generalship. To their request Morton answered:

"Your letter in regard to General Harlan came some days ago and was mislaid.

"In common with yourself, I entertain a very high opinion of General Harlan. I have long understood that he was an able lawyer and I know that he was an able politician and speaker. I also have great respect for him as an unflinching Union man in Kentucky, as I have for all in the Southern States who stood fast by the country in that hour of trial . . . ; but so far as his [Grant's] Cabinet is concerned he has always resented any interference from any quarter upon the ground that the relation was in great part a personal one

"That General Harlan would make a very able Attorney General I have no doubt, and should it be in my power at any time to serve him with the Administration I shall be glad to do so." Morton to Kelly, December 16, 1872, Harlan Papers, Miscellaneous Correspondence, 1870-1876, Senator O. P. Morton, 1872-1875, University of Louisville Law School, Louisville, Kentucky. Harlan had not relinquished his ambition to become Attorney General by 1877. Farrelly, *supra* note 2, at 163-4. See note 40 *infra*.

when it [is] vacant. In many respects the 'most delightful judicial position in the world, and in the course of events Judge Swayne's [retirement] will occur before very long. Then you would be the man, and the only man, for the place. Your [circuit] would be entitled to representation there, for it embraces great states North and South.

"Reflect upon it and let me hear from you. You are an awfully bad man but I have taken a liking to you, and it would be a great . . . pleasure for me to help to honor you."³⁶

The change in his attitude brought on by the summer's events is revealed by Harlan himself in a document which he wrote on August 21, apparently for the sole purpose of recording his recollections and expressing to himself his sentiments as they stood on that day. Judging from the large portion of space devoted to them, uppermost in Harlan's mind were ". . . sundry matters which have transpired in reference to Col. Bristow and myself and which have disturbed perhaps permanently the very pleasant & confidential relations which have existed between us for more than ten years."³⁷ He remarks that "[f]or eight or ten years I had devoted myself to his elevation, and during that period I never had an ambition or thought inconsistent with his interests."³⁸ Harlan had further ". . . suggested that he [Bristow] ought to accept the place upon the Bench if tendered him."³⁹ Bristow, though, apparently ". . . expected Hayes to do the foolish thing of calling him back to the Treasury. . . . If he could not be Secretary of the Treasury, he would, if the opportunity offered, go upon the Bench. . . . He was afraid that my appointment as Attorney General would decrease his chances to go upon the Bench—And hence he did nothing to secure my appointment, and in order to cover up his real motive, he has pretended that his dignity would not allow him to ask anything of Hayes unless the latter sent for him or asked his opinion."⁴⁰

36. MacVeigh to Harlan, May 12, 1877. Harlan Papers, Miscellaneous Correspondence, 1877-1879, University of Louisville Law School, Louisville, Kentucky.

37. Farrelly, *supra* note 2, at 162-3.

38. *Id.* at 163. See note 8 *supra*.

39. Farrelly, *supra* note 2, at 164.

40. *Id.* at 165. Harlan was informed that Hayes had gone so far as to address a letter to him making him Attorney General. Harlan's feeling was that Bristow had in some manner altered Hayes' intentions. *Id.* at 163-4. But in a contemporary report about Hayes, William Henry Smith makes remarks which throw serious doubt on Morton's avowed high regard for Harlan. "He [Hayes] did seek to please Governor Morton, as the leader deserving most from the public. His great services as war governor and his patriotism justified this preference [over Blaine and Conkling]. Morton got in the Cabinet the man he really wanted in it and kept out the man he had wanted kept out. General Hayes had selected John M. Harlan for Attorney-General but this was abandoned at Morton's request. He never knew why Morton objected to Harlan." III WILLIAMS, DIARY at 426-7 (footnote). See note 35 *supra*.

The document indicates that Harlan was distraught, but after a reconciliation he telegraphed Governor Dennison not "... to relax any effort to put Bristow on the bench."⁴¹ The accord was temporary, however, and Harlan concluded "... that our confidential relations have ceased, probably never to be renewed."⁴²

Bringing his thoughts up to date, Harlan closed his "diary" by stating: "The circumstances all now indicate that the willingness of Col. Bristow to sacrifice his friend will not be rewarded. It is quite certain that he will not reach the Bench. There is a greater probability that I will be appointed. I shall not become a contestant for it, but if my friends see proper they can urge my name. The bar of Kentucky prefer my appointment to his and that fact could easily be manifested if I were not adverse to an unseemly contest between two Kentuckians. I have been gratified at the expression on the part of many leading Kentuckians, Democrats, that I ought to be appointed. I have received personally such expressions from the Governor and from the Judges of the Court of Appeals."⁴³

Harlan's confidence that he would receive the nomination is not completely explainable. If he had private information at this mid-summer date it has not been disclosed, and Harlan never mentions any tete-a-tete with President Hayes in which reference was made to the Court vacancy. That Hayes was considering him for some important position can be established by Harlan's account of a mid-July⁴⁴ meeting at which the President offered, "'We have not said anything to you as to your wishes as to yourself.' I replied: 'I am not surprised, Mr. President, as I have not been a *candidate* for any position.' The President said: 'Would a first class foreign mission [England] tempt your ambition?' I said: 'I think not, Mr. President. . . .'"⁴⁵

Thus eight weeks before the nomination, Hayes was inclined toward Harlan. Part of the inclination was obviously in obedience to personal wishes, dictated by memories of the man who had won the presidential

41. Farrelly, *supra* note 2, at 166.

42. *Id.* at 167.

43. *Ibid.*

On September 10 W. F. Bullock, a respected judge and prominent member of the Kentucky Bar, wrote this letter to an unknown recipient concerning his pre-Civil War law partner: "Having known General Harlan from his early manhood, and intimately associated with him in his private and professional life I may confidently say the duties of this office may be safely committed to his hands." Harlan Papers, Miscellaneous Correspondence, 1877-1879, University of Louisville Law School, Louisville, Kentucky.

44. Farrelly, *supra* note 2, at 161. Relying on the vague references to dates and on a reconstructed calendar of 1877, it is probable that the date of this meeting was July 16.

45. *Ibid.*

nomination for him and who had served loyally on a much maligned commission. Yet beyond this Harlan was to be favored because he was highly reputed as a lawyer and a statesman; he was supported by Republicans and Democrats alike; and he resided in a nearly Southern state. In addition, Hayes found that alternative candidates had disqualifications which surely would obstruct their confirmation.

Shortly before the announcement of a nominee a final effort was made by Justice Miller in behalf of Ballinger. He wrote to Ballinger on October 8, and, while he does not in terms state that the choice of Harlan is assured, his tone attests to the futility of further exhortation against him:

"... I had a long and confidential conversation with Mr. Rogers his [Hayes'] private secretary who I think was frank with me.

"He said that Harlan and Wood[s] were pressed very much. That he did not think the President was much inclined to Hunt. That he believed the President's personal preferences lay between Harlan and yourself. * * *

"McCrary the Secretary of War is also of the impression that the President is hesitating between you and Harlan with a personal inclination to appoint Harlan. He said if any one not a republican was appointed he believed it would be you, but he gave me to understand that the Cabinet did not favour the appointment of a democrat."⁴⁶

One week after Miller had written this letter, Congress convened. The following day President Hayes sent to the Senate a multitude of nominations for consideration.⁴⁷ Among those names referred to the Senate Committee on the Judiciary was that of John Harlan, nominee for Associate Justice of the United States Supreme Court.⁴⁸ His nomination remained in committee for forty-one days while its members ostensibly concerned themselves with Harlan's integrity and capacity for this high post.

Harlan's character and ability had already been subjected to the scrutiny of the President. It would be fallacious to believe that Hayes was altogether preoccupied with the political suitability of the candidates. A more accurate evaluation would be that because the political repercussions involving any nominee would surely be serious, Hayes had to be certain that the man he chose could meet the highest standards, thus diminishing his vulnerability to personal attack and enhancing his chances

46. FAIRMAN, *op. cit.* *supra* note 29, at 361-2.

47. 21 SEN. J. 1877-1879 44 (1901).

48. *Id.* at 54.

of confirmation.⁴⁹ Further, the evidence uncovered by the committee, viewed concurrently with Congressional transactions, indicates that the delay in Harlan's confirmation was caused neither by antagonism to him nor by doubts about his ability.⁵⁰ The opposition was toward Hayes, and Harlan stood to suffer because his appointment stamped him a "Hayes man." A recital of the committee evidence and the Congressional action supports this proposition.

After Harlan's nomination had been announced, the Committee received a persistent flow of telegrams and letters, the majority coming from Harlan's native Kentucky. Most of them offered praise and support for Harlan, while the others attacked him on the same three points which had been pressed upon Hayes but which he had discounted: Harlan's integrity while serving on the Louisiana commission; his "purity" as a Republican; and the inadvisability of selecting another justice from the already well-represented sixth circuit.⁵¹

The only accusation which Harlan was completely powerless to disprove was the plain fact that his selection left the seventh circuit and the South unrepresented, while the sixth circuit would have three justices sitting.⁵² This argument was pressed vehemently by Melville W. Fuller, then a Chicago lawyer, though soon to be Harlan's friend and colleague as Chief Justice.⁵³ Writing in unreserved tones, his objections fortified by a twenty-one year practice before the seventh circuit, Fuller found the nomination "a disagreeable surprise." He asserted that "[i]f the President had selected Mr. Hunt of New Orleans or any other well known lawyer in the extreme South & particularly where the Civil law prevails, the feeling would have been different though even then we should have thought it wiser and more in accordance with the necessities of the situation if Judge Drummond had been selected or some other person in this Circuit, & the South been postponed to the filling in of one of the other places, but as it is there seems positively no reason for this circuit justice. It accomplishes nothing except to reward a Louisiana Commissioner, a personal & secondary consideration. I hope the nomination will fail of confirmation."⁵⁴

49. Hayes later noted in his diary that his judicial appointments would sustain examination. III WILLIAMS, DIARY at 467.

50. On October 28 Justice Miller wrote: "Though the judiciary committee still holds the nomination in its hands, my information is that it is from no unfavorable disposition towards him. But is part of a plan by which the leading republican Senators who have control of all the committees to whom all nominations are referred desire to impress the President with their power to defeat his nominations and by this means bring him to terms." FAIRMAN, *op. cit. supra* note 29, at 364.

51. See generally, Judiciary Committee Records, 45th Congress.

52. See note 31 *supra*.

53. KING, MELVILLE WESTON FULLER 132 (1950).

54. Fuller to Hamlin, October 29, 1877.

On the other hand Harlan's cause received immediate approval and backing from prominent Kentuckians in both the Republican and Democratic parties. In fact he had to rely heavily upon the support of Democrats as they comprised the Kentucky representation in the Senate. Judge Bland Ballard asked David Davis, now a member of the Judiciary Committee, to urge that "Harlan's nomination should be promptly confirmed. He possesses fine capacity and is a good lawyer."⁵⁵ James Speed telegraphed Chairman Edmunds that "J. M. Harlan never was a Democrat. He has been for eight or ten years and is now a true Republican a hard worker for and in full fellowship with the party he is qualified & faithful and ought to be confirmed."⁵⁶

Two weeks after his nomination Harlan could well have been concerned, not only about an early confirmation, but about any confirmation at all. Besides the proposition pressed by Fuller and others, there were recurring charges of dishonesty and non-Republicanism. Too, the Senate factions were embroiled in the problem of seating a senator from Louisiana. Kellogg, the Republican, and Spofford, the Democrat, each claimed to be the duly elected senator. But since the Democratic state officials and the Republican presidential electors had been legally recognized by reliance on the same ballots,⁵⁷ the question of proper senatorial credentials was impossibly controversial. This debate, of course, directly concerned the actions of both Hayes and Harlan. While seeking to discredit Hayes' policy in Louisiana, the Radicals were continually reminded that Harlan was a party to that policy. It is probable that Harlan's confirmation was delayed pending the outcome of the disputed senatorial seat.

Meanwhile, Senator Beck of Kentucky was busy soliciting votes for Harlan.⁵⁸ Considerable Democratic support could be counted on from among Beck's friends and from the friends Harlan had won by his non-partisan decision in Louisiana. Beck had to worry mostly about Republican support. While he could not expect the Radicals to support the confirmation, there was an excellent chance that if Harlan's political record

55. Ballard to Davis, October 17, 1877.

56. Speed to Edmunds, November 1, 1877. Speed dispatched a letter following his telegram in which he concluded: "It is due Genl. Harlan to say that eight or ten years ago, he sloughed his old pro-slavery skin & has since then been an earnest open & able advocate of what he had thought wrong or inexpedient." Speed to Edmunds, November 10, 1876 [1877].

57. See note 10 *supra* and accompanying text. 6 CONG. REC. 150, 635 *et seq.* (1877).

58. This was not easily accomplished since the opposition speakers had eager listeners. After ten days of the session, Hayes observed: "It is now obvious that there is very decided opposition to the Administration, in both houses of Congress, among the Republican members." III WILLIAMS, DIARY at 449. See note 50 *supra*. Because the Republicans had only a two seat majority in the Senate, it became obvious that Harlan needed strong support from the Democrats.

was unfolded, the regular Republicans would back this administration appointment. Therefore, in response to a request from Beck, Harlan forwarded a letter outlining his career

This letter, its accuracy thoroughly supported by local contemporary sources,⁵⁹ is an excellent account of Harlan's public activity prior to the achievement of national prominence for his work in Hayes' nomination.

Louisville Ky
Oct 31, 1877

Hon James B. Beck
Washington D C.

My Dear Senator

I thank you for your letter of the 29th advising me of certain stories which are being circulated in Washington for the purpose of preventing my confirmation.⁶⁰

I learn from your letter that my record as a Republican is being assailed by certain parties. You know very well that I do not claim to have been a Republican ever since the date of the organization of the Republican party⁶¹ You know also that the Republican party had no organized existence in this state until the Presidential contest of 1868—certainly not before 1867⁶²

My first vote for President was in 1852 for Scott—In 1856 I voted for Fillmore—in 1860 for Bell & Everett.—in

59. The major collection of early Louisville Republican newspapers is in the Louisville, Kentucky, Public Library. There were no newspapers available covering the campaign of 1868 and 1876 as the footnotes, *infra*, indicate. The writer was unable to find extensive accounts of Harlan's activity in the available Democratic newspapers. It must be recognized that Harlan, while canvassing, often spoke two to four hours daily, at least six days a week. The newspaper accounts related here are typical of Harlan's views on national issues.

60. No present record of this letter could be found.

61. It is difficult to set any precise date as the origin of the Republican Party. See JOHNSON, PROCEEDINGS OF THE FIRST THREE REPUBLICAN NATIONAL CONVENTIONS OF 1856, 1860, AND 1864 2-4 (1893), Dunning, *The Second Birth of the Republican Party*, 16 AM. HIST. REV. 56 (1910).

62. Colonel Tarvin R. Baker speaking at Newport, Kentucky on July 28, 1868, always referred to himself as "the candidate for the radical Union party of the State." He further stated. "From that time [1861 when Kentucky was on the verge of secession] down to the last election [1866], the State of Kentucky was under the control of the Union party, the radical party, the party that was for prosecuting the war and whipping the rebels." Louisville Daily Journal, July 28, 1868, p. 1, col. 6. Three days later he commenced his remarks by formally saying that "he was the standard-bearer of the Republican party of the State of Kentucky." Louisville Daily Journal, July 31, 1868, p. 4, col. 4.

Though the political situation in Kentucky during the decade from 1860-1870 was fluid, with the parties fluctuating in platform, constituency and leadership, the party name which persisted among those opposed to secession was "Union." See generally SPEED, *THE UNION CAUSE IN KENTUCKY* (1907). Harlan was reared in a slave-holding political atmosphere and retained those affiliations until association with them became synonymous with secession. See Clark, *supra* note 1, at 415.

1864 for McClellan.⁶³ I did not vote for McClellan because I was a Democrat, or because he was a Democrat, but because I *then* believed that his mode of prosecuting the war was most likely to bring it to a speedy conclusion, with the Union preserved intact. But subsequent events satisfied me that my judgment in this particular was erroneous, and in my speeches delivered in this State in 1868 1871, 1872 & 1875 I declared publicly that my vote for McClellan was wrong, and that, in the light of the events transpiring after 1864, the defeat of Mr Lincoln would have been the greatest calamity which could have befallen the country at that time. In the Speeches which I made for McClellan, I placed my advocacy of him upon the ground that, in his letter of acceptance, he had declared for the preservation of the Union at all hazards and at whatever cost.⁶⁴

63. Of the candidates to which Harlan refers, only McClellan was a Democrat; Scott was a Whig, Fillmore an American, Bell a Constitutional Unionist. Harlan's association with the American party in 1855-6 was tantamount to advocating rigid immigration laws. Thus it took courage to stand before a German immigrant audience while campaigning in 1871 and say, "I have lived long enough and am bold enough to say tonight, that I committed a great error in becoming a member of the American party, in 1855. . . . They say I am inconsistent. My friends, I would rather be right than consistent. Tell me of any man who has lived in our midst in the last ten years without changing his views on the public policy of the day, and I say he is either a fool or a knave, I don't care which. (applause and 'you're right'.) . . ." Louisville Daily Commercial, May 31, 1871, p. 4, col. 4.

64. Concerning McClellan, two accounts bear Harlan out on his frankness and regret. A reporter said this of a speech Harlan made while stumping Indiana in 1872: "Tonight he addressed in the Wigwam at this place fully three thousand [persons, and] he held by the weird power of his logic and eloquence that audience an hour and a half. His frank regrets that he was not a Republican from the start, and his thorough conviction of the great mission of the Republican party, placed him in immediate sympathy with the loyal citizens of this grand Republican County of Kosciusko." Louisville Daily Commercial, Aug. 21, 1872, p. 2, col. 4.

Again in 1875, while in a debate against James B. McCreary, the Democratic candidate for governor of Kentucky, Harlan's words were reported when he was questioned about his political inconsistency: ". . . [U]pon every occasion except one in his career since he had arrived at the years of manhood he had voted with the organization which stood opposed to the Democratic party. That occasion was when in 1864 he had voted for General McClellan for the Presidency. But he voted for McClellan not because he was the Democratic nominee, but because of his letter of acceptance, in which he repudiated the platform upon which he stood, and boldly declared for the preservation of the Union, in favor of furnishing men and money to whatever extent might be necessary to maintain the unity of the country. He had confidence in the patriotism of General McClellan, and his belief at that time was that the election of McClellan would result in the speedy suppression of the rebellion and the restoration of national authority. But he did not hesitate to avow, even here in Kentucky, that he ought to have voted for Lincoln in 1864. He saw subsequently what he did not then believe, that the re-election of Lincoln in 1864 was necessary to the safety of the country and to the maintenance of the army in the struggle which it was then having to save the country. He gave his first Republican vote for President in 1868, and voted then for General Grant, and voted again for him in 1872, and he felt proud of the votes that he had then given. He was proud to be a member of that party." Daily Louisville Commercial, June 19, 1875, p. 1, col. 3-6.

In 1866 I stumped the State for Hobson, the Union Candidate for Clerk of the Court of Appeals against Duvall, the candidate of the Southern Rights Democracy.⁶⁵

In 1867 I was identified with what was known at that time as the "Third" party in this State, composed, as you know, exclusively of persons who, during the war, were for all the money & men necessary to suppress the rebellion—but in 1867 the Third party ceased to exist—and not until 1868 was there any well defined organization of the Republican party in this State.⁶⁶ In that year I announced my purpose to adhere to and sustain the Republican party. I canvassed Kentucky & portions of Indiana for Grant & Colfax, defending the action of the Republican party in passing the 13th and 14th Amendments.⁶⁷

In 1871 I was, much against my wishes, unanimously nominated as the Republican candidate for Governor.⁶⁸ You are familiar with the Canvass I made for you participated in it for my opponent. A speech delivered by me at Livermore Ky in July 1871 was published, and from that I send you herewith some extracts showing what I said about the Amendments, Civil Rights, Kuklux &c.⁶⁹ Again in 1872, I canvassed this

65. Harlan was more than a stump speaker in Hobson's campaign. At a meeting of the Union men he offered the resolution adopting Hobson's nomination. Harlan declared that Hobson ". . . should receive the hearty commendation and sanction of every citizen of Kentucky who rejoices that the rebellion has been suppressed, and the national unity preserved; and who is opposed to the surrender of the Union State to the exclusive control of the men and principles of the rebellion. . . . In many counties this new fangled Democracy are [sic] proclaiming by their nominations and otherwise that none but the friends of the 'South' and the rebellion should receive their suffrage. Though beaten in the field of battle they propose to renew at the ballot-box the contest for supremacy of principles which had much to do with bringing about the war and which if not repudiated by the American people, will again embroil the nation in trouble and difficulty. . . . Let us, then, my friends, rally around the gallant Hobson. Quarrel not about the past, or about issues in other States, in the presence of an issue *here*, forced upon us by those who regret that the Union was not dissolved and the Southern confederacy established." Louisville Daily Journal, July 2, 1866. p. 1, col. 2 and 4.

66. See note 62 *supra*. "In 1867 he ran for Atty. General on the ticket calling itself National Democrats. It was a third party so called in our politics. Composed I suppose entirely of . . . Union men who would not support the Republican ticket nor the regular Democratic ticket. It got but few votes & never again appeared in the arena." Guffy to Edmunds, November 9, 1877.

67. See note 59 *supra*.

68. Harlan apparently did not make public his personal opposition to the gubernatorial nomination, but of the unanimity of his support a newspaper reports that ". . . there seems to be little difference of opinion as to Gen. Harlan's nomination for Governor. His name excites the warmest enthusiasm. . . . [T]he nomination of Harlan will be unanimous. . . ." Louisville Daily Commercial, May 17, 1871, p. 1, col. 1.

69. During the campaign Harlan delivered speeches of two or three hour duration almost daily; available extracts elucidate his position. At Lexington ". . . Gen. Harlan declared his adhesion to the results of war as embodied in the last three Constitutional Amendments, With [sic] the reconstruction policy, and charged the Democracy with perpetuating bitterness, strife, and the seeds of civil contention, by seeking their overthrow. . . ." Louisville Daily Commercial, May 24, 1871, p. 1, col. 1.

At Livermore Harlan arraigned the Democrats for ". . . agitating the repeal of

State for Grant & Wilson⁷⁰—gave two weeks & more to the Can-

the fourteenth and fifteenth amendments . . ." and for ". . . refusing to pass an efficient law for the suppression of the Kuklux. . . ." Turning to the subject of slavery Harlan avowed that "[t]he most perfect despotism that ever existed upon this earth was the institution of African slavery. It was an enemy of free speech; it was an enemy of good government; it was an enemy to a free press. I rejoice that these human beings are now in the possession of freedom, and that freedom is secured to them in the fundamental law of the land beyond the control of any State." Harlan returned to the topic of Ku Kluxism and vent his emotions upon the Democrats in control of the legislature who ". . . allow bands of murderers, with masks upon their faces, to go into the capital of the State, defy the courts of justice, and intimidate the Legislature itself, and have refused . . . to provide means for the suppression of such lawlessness, and the vindication of law and order. . . . I have carefully examined that Kuklux bill [Congressional anti-Klan bill], and while I entertain some doubts as to the constitutionality of one of the provisions in that bill, I see nothing in it to create any serious alarm among the law-abiding citizens of Kentucky." Harlan's final remarks were about the Civil Rights bill. "I have no doubt that the construction placed upon it by these Democratic orators is equally ridiculous with that placed upon the Kuklux bill[;] . . . thousands of gallant men in the State of Kentucky owe their lives to that bill, and to the fact that it opened the doors of the Federal courts for the protection of their lives, their liberty, and their property." Louisville Daily Commercial, July 29, 1871, p. 3, col. 2-5. For an account of the local issues involved, see Hartz, *supra* note 2, at 36-39. These were the basic arguments which, though polling a large vote in his favor, brought him defeat by over 36,000 votes. Louisville Daily Commercial, Aug. 21, 1871, p. 2, col. 1.

Harlan's personal sentiments on the election returns are available in his letter to John Bruner on August 26, 1871:

"You have doubtless seen the election returns—My vote will nearly reach 90,000—sufficient, in all past elections, to[o] for success. In this city, and elsewhere, the Democrats voted early and often—The vote polled & unpolled indicates a population in the State of almost 1,700,000—which is more than we have by 400,000. We have at least 10,000 colored votes unpolled & can enter the contest of 1872 with a certainty of polling over 100,000 votes. We can carry the State in 1872, if we will keep up our organization. . . ." Bruner to Harlan, August 26, 1871, Bruner, John B., 1825-1878, Letters 1871, Filson Club, Louisville, Kentucky.

70. At the Republican convention in the summer of 1872, the Kentucky delegation was pledged to Grant for President and Harlan for Vice-President. Daily Louisville Commercial, March 13, 1872, p. 3, col. 3-5.

There is ample evidence that Harlan stumped long and vigorously for Grant in 1872. He eased his efforts late in the summer only because his legal work demanded his attention. Excerpts from one of his speeches in Louisville show his analysis of the presidential race. "Notwithstanding the Greeley cry of peace and reconciliation there were among the great masses of the people, North and South, of all parties, feelings of kindness and good will. There was in fact no 'bloody chasm'. . . . Born and reared under the shadow of that accursed institution (slavery), with all his early prejudices enlisted in its support, General H. rejoiced that all men in this land are now recognized by the Constitution as free and equal before the law. The foul stain of human bondage has been wiped from our national escutcheon, thanks to the heroic devotion to the principles of freedom on the part of the Republican party of the Nation. . . . Whatever the people of the South may have thought of some of the provisions in those reconstruction laws, no patriot can now desire that the work of reconstruction shall be overthrown. . . . The South has been sorely afflicted since the close of the war with that class of impractical politicians who have persistently sought to impress upon the public mind that the people of the North hated the people of the South and desired to degrade and oppress them. . . . [T]o the teachings of just such men are we indebted for the organization of that band of cowardly murderers called Kuklux. . . . Why follow blind leaders any further in a direction which will inevitably lead our State to ruin? . . . [P]rosperity has come to us under Republican administration. . . . Mr.

vass in Indiana,⁷¹ and upon my return home, received a letter from Senator Morton thanking me for the effective service which I had rendered for the Republican Cause in that State. If I can find that letter before this mail closes I will send it to you.⁷²

Upon the conclusion of my canvass in Indiana I went to Maine, at the urgent request of Senator Blaine, and spent two weeks there with the late Vice President Wilson, Gen. Butler, Gen. Woodford, Frederick Douglass, &c. The character of speeches made by me in that state are well known to Mr. Blaine, Gen. Butler, Gen. Woodford, & Mr. Douglass, and also to Mr. Hale and Mr. Frye.⁷³

In the same canvass I spoke in Boston and in Manchester, N. H.⁷⁴

Greely, until he sought their sufferage, denounced them [the South] in unmeasured terms, and attributed to the South a purpose to [gain] at the ballot-box what they had lost on the field of battle. . . ." Of General Grant, Harlan found it significant enough to remark that he had "... refused to take Lee's sword ... [and] stood between Lee and the vengeance of Andrew Johnson. . . ." *Louisville Daily Commercial*, Nov. 3, 1872, p. 4, col. 5.

71. Harlan canvassed Indiana extensively drawing large and enthusiastic crowds wherever he spoke. One account tells of how "[h]is keen incision into the hollow pretensions of the Greeley party with its Northern side and its Southern side, its Janus face, looking North for Republican votes and South for Rebel-Democratic votes, will not soon be forgotten. When he ranged the speeches of Northern Liberals alongside of Southern Democrats . . . the audience saw clearly it was a new decoy duck to lure the nation into the meshes of the old treason pro-slavery party." *Louisville Daily Commercial*, Aug. 21, 1872, p. 2, col. 4.

72. The letter was written from Washington after Grant's election. In it Morton laments, "I remember what you said—that if the Republicans carried Indiana, Ohio, and Pennsylvania in October they could carry Kentucky; but I confess that I had little faith in it at the time and thought you were somewhat sanguine; but subsequent events have shown that you were right, and that Kentucky could have been carried by an effort and general canvass. The result in Kentucky proves that the Republican party has a permanent establishment and footing there, and gives omen of victory at a very early period. Your able canvass last year had much to do with the late result, and when the time comes again I will contribute my little effort if it is desired, provided I have health and strength left.

"For your services in Indiana during the late campaign, I desire to thank you not only for myself but for the whole Republican party. Your speeches everywhere received the most cordial approval and produced marked effect, and you have made for yourself all through our State hosts of friends and admirers who will watch your future fortunes with interest and rejoice in your success." Morton to Harlan, December 8, 1872. However, Morton would not aid Harlan's efforts to obtain the position of Attorney General; see notes 35 and 40 *supra*.

73. Of one of his speeches in Maine it was said, "His address was one of the ablest, most logical, eloquent, and effective of the campaign. . . . There can be no question that the Republican majority in Maine will be increased next Monday." *Daily Louisville Commercial*, Sept. 3, 1872, p. 1, col. 3. In another city the report stated, "... General Harlan . . . has only been in the State since last Monday, but he has made himself famous. . . . His arguments on the reconciliation business, so harped upon by the Greeleyites, is especially noted here, and coming from a Southern man it is accepted with more candor than otherwise. . . ." *Louisville Daily Commercial*, Sept. 8, 1872, p. 2, col. 3.

74. In Boston, Harlan was received with "... an ovation which lasted some

In 1875 I was required to make another canvass of the State as the Republican candidate for Governor.⁷⁵ One of my speeches was published and I send herewith some extracts from it.⁷⁶

In 1871, 1872 & 1875 & again in 1876, I defended all of the Amendments as just & proper, as the law of the land, to

time,..." and then delivered a speech described as "...the most elaborate he ever made, and being a review of the issues of the campaign from a Southern standpoint, was listened to with the closest attention throughout." *Louisville Daily Commercial*, Sept. 12, 1872, p. 1, col. 2. His campaign closed in Manchester with praises that "... [h]is tour in New England has been attended with great good to the cause. . . ." *Louisville Daily Commercial*, Sept. 14, 1872, p. 1, col. 2. Harlan's canvass was even more extensive than he mentions. Records show that Harlan spoke in Dayton, Ohio, before the largest crowd ever assembled there. *Daily Louisville Commercial*, Aug. 20, 1872, p. 1, col. 2.

75. Though Harlan was again nominated as "... the unanimous choice of the convention . . .," he felt compelled to say before accepting, "... I caused it to be announced in the public prints that I did not desire a nomination . . . not from a doubt that the Republican party to Kentucky could cast a large[r] vote than . . . in 1871 or . . . in 1872. . . . If it be expected of me that I shall devote to this canvass as much time and labor as I did to that of 1871, I shall be constrained to adhere to my original purpose and decline the nomination . . . it will be impossible for me to enter upon any active canvass until after the courts in this city commence their usual summer vacation [July 1]. . . . Any other course on my part would compel me to neglect not only my private business but, what is more, the interests of others committed to my hands; and that I cannot consent to do. . . ." *Daily Louisville Commercial*, May 14, 1875, p. 1, col. 3-4. These words do not come from an ungrateful or apologetic party leader. The position of the Republican party in Kentucky was not an enviable one, and it was even less comforting to the man who would have to bear the criticism and rebuke, however undeserved, and who would also be required to spend long hours on the stump in daily debates. In his position Harlan was able to prognosticate the August election results: strenuous Republican effort ending in defeat.

Senator Morton, too, though offering congratulations, could only foresee futility in Harlan's canvass. "Your re-nomination yesterday for governor by the Republicans of Kentucky was made with a heartiness and determination that proves their appreciation of the great ability of your former canvass and of your character as a man. It is in the highest degree complimentary and although the prospects of your election is not good, owing to the great bourbon majority, I am sure neither you or your friends will regret your acceptance." Morton to Harlan, May 14, 1875, Harlan Papers, Miscellaneous Correspondence, 1870-1876, Senator O. P. Morton, 1872-1875, University of Louisville Law School, Louisville, Kentucky.

76. The issues were the same as in 1871, and Harlan spoke out as before. He again answered the old charges of political changeableness. He spoke out for the amendments; and he charged the Democrats "... with having been dilatory in the suppression of KuKluxism, thereby encouraging lawlessness, and preventing immigration to the State." *Daily Louisville Commercial*, June 24, 1875, p. 1, col. 4. Concerning the civil rights bill he argued: "The Government would have been recreant, disgraced, if it had not opened the doors of justice to these people [Negros] and protected them." *Daily Louisville Commercial*, June 29, 1875, p. 1, col. 5. "He desired that all citizens should recognize the results of the war, and that all should receive equal protection of life, liberty, and property; that the great doctrine of equality before the law, without regard to race or color, should be heartily recognized throughout the land. . . ." *Daily Louisville Commercial*, June 19, 1875, p. 1, col. 6. Harlan was defended by nearly the same margin as in 1871. See *Daily Louisville Commercial*, Aug. 18, 1875, p. 1, col. 2.

which everybody owed obedience & urged their enforcement by all necessary legislation.⁷⁷

In my two contests for Governor the platforms upon which I stood endorsed the Amendments.⁷⁸ From 1868 to 1877 inclusive I have uniformly sustained the Republican candidates in all political contests, and I have, perhaps, made for that party as many sacrifices of time & labor as any other Republican in the South.

In reference to the story that as a member of the Louisiana Commission I offered pay & mileage to members of the Packard Legislature to induce them to gain the Nichols Legislature, it is utterly false. The Commission while at New Orleans received committees & delegations from both parties. We heard the statements of all who desired to speak. Upon one or two occasions, the Republican members of the Commission held interviews under Republican delegations, at the request of the latter, and for the purpose of a free interchange of views as *Republicans*. The record of the Commission & of each individual member of it, is clean and clear of all impropriety. For myself, & I doubt not for every member of the Commission, I can say that nothing was said, done or written by the Commission or by any member of it which all the world might not know, and which all the world may know so far as I am concerned. Any imputation of improper methods to the Commission or to any members of it, in connection with the Louisiana business, is unjust, and without the slightest foundation upon which to rest.⁷⁹

77. See notes 59, 69, 70, 71, 76 *supra*.

78. "... General Harlan announced the acquiescence of himself and his party in the thirteenth, fourteenth and fifteenth Amendments . . . not only as right in themselves, but as the reasonable and proper sequence of the war and the only means of putting at rest the many disturbing questions that had arisen out of it. . . ." Louisville Daily Commercial, May 26, 1871, p. 2, col. 3. This was likewise true in 1875. See Republican Platform of 1875, Judiciary Committee Records, 45th Congress.

79. The imputations were pressed particularly by H. V. Boynton and one W. H. Painter. Boynton, Washington correspondent of the Cincinnati *Gazette*, was a friend of Hayes but a closer friend of Bristow. His belief that Bristow had not received sufficient consideration for the nomination caused an estrangement between him and Hayes. See III WILLIAMS, DIARY at 445-6. On November 10 Hayes felt Boynton "... will be, and is, friendly to me. *I am sure of it.* He does not like some of my associates, and opposes some of my doings, but I look only for a friendly criticism hereafter." *Id.* at 452. Three days later Boynton wrote the Judiciary Committee: "I can repeat the conversation which I had with Gen. Harlan which embraces all I know in reference to the subject of matters in New Orleans. It was some weeks ago—perhaps six weeks ago—He was in my office. The question was being talked of as to Butler's proposed investigation as to McVeigh (&c); as to the sum of 1500\$ alleged to have been used in breaking up [the] Packard legislature. I said to Gen. Harlan your commission next winter will have to meet this charge; I mention it to you in a friendly way as a matter of interest. He said he knew nothing about it whatever. If money had been used in that way he had no connection with it. He then said the only thing he heard of while in Louisiana that would render it probable, was that towards the close of their labors there, there arose a claim of employee's

There is one other story which another friend writes me is being circulated about me in Washington. It is that I resigned my Commission in the Army because of dissatisfaction with the President's Proclamation of Emancipation. Like the other stories, this one is utterly false. It was started by a low fellow who is hanging around Washington as a lobbyist & is known by him to be untrue.⁸⁰

You will remember that my father died very suddenly in 1863, leaving his business & estate in such condition as to demand my personal attention. He had become largely involved as surety for Thomas S. Pat and others. For these reasons & for no other, I was constrained to send my resignation to Genl. Rosecrans. Before doing so I consulted Gen. Thomas, my old Division Commander, & he approved of that course.⁸¹

Being from a Slave State, and fearing that my motives might be misunderstood, I determined that, in my letter of resignation, I would state my reasons for resignation. In that letter I gave as my reason that my father's death had compelled me to return to civil life, and among other things I said:

"I deeply regret that I am compelled, at this time, to return to civil life. It was my fixed purpose to remain in the Federal Army until it had effectually suppressed the existing armed rebellion, and restored the authority of the National Government over every part of the nation. No ordinary considerations would

for the payment of salaries & some person connected with the Packard gov't, had come to them & asked them to see if some such payment could not be made; they then had a conversation with some of the Nichols men. He was then informed that [a] sum of 40,000\$ was then raised to put the Nichols gov't on its feet. They said some part of that sum could be used for the payment of those employee's perhaps. As to payment to any member of the Legislature, he had no knowledge. That is the only conversation in reference to the use of money with Mr. Harlan, that I ever had.

"Nothing was ever said by Harlan in reference to the use of money to break up the Packard Legislature, nothing whatever. The only other conversation was before the commission went down there. Nothing [was] said in reference to inducement, monetary or otherwise, to members, to desert [the] Packard Legislature & to join [the] Nichols Legislature." Boynton to Judiciary Committee, November 13, 1877. Painter's letter states that it was he who solicited Boynton's testimony for the Committee. After paraphrasing Boynton's remarks he adds: "I think that some little effort ought to be made to save the Supreme Court from passing into the hands of the late enemies of the Gov't & their allies. I think that a man who spends months *personely* [sic] electioneering for a place on the Bench ought to be rejected. I think a man who is by his own confession a particeps criminis to the late debauchery & revolution at New Orleans will be a dishonor to the bench. I think a man who opposed all the late Cons' amendments is a dangerous man to trust on the bench. So I ask you to go slow & to go to the bottom of the reality [?] at New Orleans." Painter to Edmunds, October 4, 1877. See also notes 21 and 25 *supra* and accompanying text.

80. See note 88 *infra* and accompanying text.

81. For an account of this incident and other particulars of Harlan's activity during the Civil War see Hartz, *supra* note 2, at 24-27. See also SPEED, *op. cit. supra* note 62, at 230-2.

have induced me to depart from this purpose. Even the private interests, to which I have alluded would be regarded as nothing, in my estimation, if I felt that my continuance in or retirement from the service would, to any material extent, affect the great struggle through which the country is now passing.

"If, therefore, I am permitted to retire from the army I beg the Commanding General to feel assured that it is from no want of confidence either in the justice or ultimate triumph of the Union cause. That cause will always have the warmest sympathies of my heart, for there are no conditions upon which I will consent to a dissolution of the Union. Nor are there any conditions, consistent with a republican form of government, which I am not prepared to make in order to maintain and perpetuate that Union."

You will find that letter in Vol. I, Lindsey's Adjutant Genl. Report Kentucky p. 823. It is in Congressional Library

I have written more fully than I intended but your letter seemed to call for a full statement of my political record. You will understand that I do not care to make any issue with anybody about what I have said or done in the past, unless the Committee wish me to speak.⁸² But knowing very well how easy it is to be misrepresented, and in order that no one may condemn my nomination, under any misapprehensions of myself, I have written fully & frankly, submitting this letter and its enclosures to you for such use as you may deem right and proper.

For obvious reasons I should not like to be placed before the country as defending myself against assaults, which I have no reason to believe are regarded by the Judiciary Committee as of any consequence. I take it for granted that no such attack can influence any just-minded Senator — and that I will not be prejudiced in the minds of the Committee, without an opportunity being given me or my friends to be heard—

But I repeat that the whole matter is left to your discretion, knowing that you will guard me against the appearance of voluntarily introducing political matters in a discussion about the propriety of my nomination for a high judicial position. I should have been glad to remain silent until the Senate had taken final action.

Yours truly,
John M. Harlan⁸³

82. Harlan was never requested to testify personally before the Judiciary Committee.

83. Harlan to Beck, October 31, 1877. Footnote references in this letter have been added by the writer. The paper variously known as *The Louisville Daily Journal*

However forthright this letter may have been, however easy to verify by appealing to the recollections of men then living, it did not lead to speedy confirmation. For twenty-nine more days the Judiciary Committee purported to consider Harlan's fitness for office. Again there is strong suggestion that further delay resulted from antagonism toward Hayes and his moderate policies.⁸⁴ At the same time, however, the fact that Harlan had other enemies, apparently personal, may have provided the Radicals with excuse for prolongation of committee hearings.

One account from "... a discreet and reliable man & undoubtedly Republican. . . ."⁸⁵ who resided in Kentucky from 1865 to 1867, warned

(see note 62 *supra*), The Louisville Daily Commercial (see note 63 *supra*), or The Daily Louisville Commercial (see note 64 *supra*) was the only Republican newspaper in Louisville during the period of Harlan's early career in Kentucky and is thus the major source of material concerning that career. Cf. note 59, *supra*.

84. A report of a Committee meeting, in which Harlan's activity on the Louisiana Commission is discussed, states: "'Objection mainly comes from the republican members of the committee, who say that while they have not made up their minds to vote for or against Harlan, still they would prefer that these allegations be properly explained before proceeding any further. A prominent democrat said to-night that the things brought against Harlan as objections were, he believed, all true, yet the same and more things might be said against Postmaster General Key, and so far as Harlan's action regarding the legislature of Louisiana was concerned, if there was any wrong in that it was no more than every member of the Louisiana commission was guilty of, and right here comes the point. The republican senators seem to cherish a sort of special grievance against not one but all the members of that commission, and it would not be surprising to find that every man who was upon that commission and comes before the senate for confirmation to any appointment will meet with decided opposition.'" The Indianapolis Sentinel, Oct. 31, 1877, p. 7, col. 3.

Conkling again seems to be the prime instigator of this opposition. "Washington, Oct. 31—Conkling showed teeth to Hayes to-day both in the open senate and in the committee. The occasion was the recent appointments of the president, which were made without consulting him. He believes the administration is making war on him, and he is striking back." The Indianapolis Sentinel, Nov. 1, 1877, p. 1, col. 1.

Eleven days later Conkling was reported to have held this interview: "'The Louisiana bargain and sale of which you spoke, senator seems likely to be revived by investigation or otherwise.'

"Mr. Conkling said nothing on this directly. 'Was it consistent,' he said in a moment, 'for the president of the United States to send his agents into Louisiana to bargain with that man Nicholls, who by all the evidence, and by the status of the case, was a red-handed traitor to his state government? This dealing with usurpers to regain the summit of power is a novel practice in our country. An honorable president, feeling himself to be elected, would have refrained from any such intrigue with pretenders in states that were ready to revolt. He would have taken his office manfully, graciously and inspired respect without bargaining for it. All he had in honor to do was to withdraw the troops, and to that no one would have objected. So long as Mr. Hayes is in the presidential chair those old and substantial republicans in the north will never look on him with respect, while Governor Packard, discredited, silent and removed, appears as the victim, but looks on.'" The Indianapolis Sentinel, Nov. 12, 1877, p. 4, col. 5. Conkling denied the interview, but disclaimed the views expressed only in that they were "indefinite." The Indianapolis Sentinel, Nov. 13, 1877, p. 2, col. 1.

85. This is the reference by the Honorable Rush Clark, representative from Iowa, concerning John Ledwick, a lawyer then residing in Iowa, given at the request of Senator S. J. Kirkwood of Iowa. Clark to Kirkwood, November 21, 1877.

that Harlan "... is not a jurist and never was accredited with being. Is not in full sympathy with the Republican party and never was. Never had any influence in his own state that amounted to anything. And while professing to be a Republican, he would have things a little different [sic]. Just enough of a change to suit Kentucky Rebels. He is in fact a milk and water politician [,] a political demagogue who all his life has been after office, but his fitness as a judge never entered the minds of his Kentucky friends. He has been brought up in a bitter sectional state, where sectional ideas predominate and if confirmed will give them force and effect at the first opportunity."⁸⁶

Speed S. Fry, who ran for State Treasurer in 1871 on Harlan's ticket, wrote:

During my canvass [in 1866 as Republican candidate for Congress] I fell in company with General Harlan in Frankfort, his then home, and in a conversation with me on the subject of negro slavery he was very bitter in his denunciation of the Emancipation Proclamation issued by Mr. Lincoln and in the course of our conversation remarked that "he had no more conscientious scruples in buying and selling a negro than he had in buying and selling a horse, that the right of property in a negro was identical with that of the property in a horse, and that the liberation of slaves by our general government was a direct violation of the Constitution of the United States. * * *

It is however due to General Harlan to say that since that time I have heard him give utterance very opposite sentiments and that he now claims to be a thorough Republican on all the issues growing out of the Amendments to the Constitution affecting the rights of the colored people.⁸⁷ * * *

I want it distinctly understood that I bear no malice to this General, although I believe his influence went very far to defeat me in my application for the office of U. S. Marshall for this Dist. of Ky.⁸⁸

86. Ledwick to Kirkwood, November 17, 1877.

87. During his first gubernatorial campaign, Harlan said, "Now fellow citizens, probably some of you will say that I have been inconsistent upon the subject of slavery. I grant it. . . . I am here today before this audience, that once knew my sentiments on that subject, to say that I regret that I ever advocated the sentiments which I expressed before you in 1859, and there is no man on this continent, from the lakes on the North to the Gulf on the South, that rejoices more than I do at the extinction of slavery on this continent, and that the sun of American liberty shines on no slave. (great applause.)" Louisville Daily Commercial, May 26, 1871, p. 2, col. 3.

88. Fry to Brown, November 2, 1877. Though the identification is not positive, William Brown would seem to be the "low fellow" whom Harlan, in his letter to Beck, mentions as lobbying against him. See text accompanying note 80, *supra*. Three facts suggest this. First, Fry's letter was enclosed in one from Brown with an indication that it was Brown who solicited Fry's accusations while adding his own: "Can you not postpone this confirmation until the regular session? . . . Harlan is deficient in legal and professional education, such as ought to be had by any one on the

The reaction of those persons close to Harlan to these assaults may be gauged by letters from his brother Wellington Harlan: "I suppose Fry's letter . . . in the Cinti Commercial has not escaped your notice. I have just learned the immediate moving cause of his writing it. Bill Bradley was in Louisville when the President was there and no notice was taken of him [Fry]. On his way back he cried out, so badly was he hurt by the snubbing he got. . . . Last week Tom Morrow who is B. B.'s brother-in-law was in town in close consultation with old Fry. Will Goodloo tells me that he [Fry] approached them several times when they showed very plainly that they wished to avoid him. Immediately thereafter his piece of ancient history was sent to Washington. I do not think however that he wrote it. I have told you for years that F is the most improper fool and the greatest liar in the state. He can be used as a tool by any knave who will flatter him a little. Of course Bradley & Morrow and Linney have no more respect for him than any other dirty tool they use. Fry's action in this matter is of piece with his whole course in politics here. He seems to have neither sense nor conscience. I said long ago that he was the best man to his enemies and the worst to his friends in the world. Is it true that Bill Brown is opposing you at Washington?⁸⁹ What is the matter with him. If you have any private information in regard to your confirmation let me have it." Later Harlan's brother added: "It seems to me that men who have supported you twice for governor are engaged in a very small business when they try to call your republicanism in question. What upon earth have you done to old Fry that he can have any possible excuse for such a low flung proceeding."⁹⁰

It is difficult to determine the impact of such accusations on the Judiciary Committee, but its internal differences after five weeks of in-

Supreme Bench. As for general scholarship or literary attainments, he has *none*. I defy any one to prove from any oral, or written, or printed utterance, he ever made that a literature, ancient or modern, ever existed, and as sure as you and I live, we will both see the hour when he will be the sycophantic friend and suppliant tool of the Democratic party. He *was that* when he thought it was to his interest to be so. He *will be so* again when he believes his interests require it." Brown to Edmunds, November 19, 1877.

"There is to my mind a daily growing conviction that there must be some agreement between Harlan and the Democrats or they would not be so anxious to have him confirmed. Confirm him and the Supreme Court's political power is lost to the Republicans forever." Brown to Edmunds, November 21, 1877. Secondly, Wellington Harlan speaks of a Bill Brown who is opposing his brother in Washington. See text accompanying note 89 *infra*. Thirdly, in his letters to Edmunds, Brown gives his address as Washington, D. C.

89. Cf. note 88 *supra*.

90. W. Harlan to J. Harlan, November 20 and 25, 1877, Harlan Papers, Miscellaneous Correspondence, 1877-1879, University of Louisville Law School, Louisville, Kentucky.

vestigation are revealed in a final letter by Justice Miller. This time he voiced his approval of Harlan and his vexation with the members whom he accused of playing politics. It was November 21 when he wrote:

"The Senate Judiciary Committee are making trouble about Harlan's nomination. Edmunds the Chairman and Christianity have both called on me about it. As far as I can learn Edmunds, Conkling and Howe are disposed to make protracted inquiry into his fidelity to the constitutional amendments and the reconstruction acts of Congress. Also to inquire into charges made to the effect that he and other members of the committee who went to New Orleans at the request of the President, aided and abetted or at least connived at a system of intimidation and bribery by which a sufficient number of the Packard legislature was induced to join the Nicholls body to give it a quorum. I think this both unwise and unjust. Harlan is as true a man I have no doubt to the constitutional amendments as any man from a Southern State, who may have doubted the wisdom of some of them when they passed. And no one who knows him, or Judge Lawrence of Illinois or Hawley of Conn. would believe for a moment that they would countenance either bribery or intimidation in the other matter.

"I told Judge Christianity who holds the balance probably in Committee that, and I also told him that if the Republican party in Congress was going to have a rupture with the President they could not afford to inaugurate the fight by refusing to confirm such a man as Harlan. I hardly think it will come to a fight and if it does he will be confirmed.

"They (the men I have mentioned) have selected Harlan because two members of the Committee, namely Howe and Davis are from the circuit which is vacant and both are mortified that a name outside of the district has been presented. Howe no doubt is inclined to resent this as well as to join Edmunds and Conkling on general principles. But Davis is personally friendly to Harlan and will not I feel sure join to defeat him on the grounds assumed by the three gentlemen at the head of the committee. If however the Committee should report against him I think he would still be confirmed."⁹¹

By this time it is probable that any anxiety Harlan may have felt had become more of an impatient annoyance. On November 19, Senator Beck offered cautious encouragement to Harlan, writing, "I do not wonder at your annoyance at this delay. I am greatly annoyed myself. I am promised a report tomorrow, & a favorable report I hope for it.

91. FAIRMAN, *op. cit. supra* note 29, at 369-70. Aligned with Davis, in Harlan's favor, were Allen G. Thurman, Ohio, and Joseph McDonald, Indiana. If, then, Isaac P. Christianity of Michigan, did hold the balance of power, Hayes felt he could "count on" him. See III WILLIAMS, *DIARY* at 448.

I think nearly all our side will vote for you. *Texas against you*.⁹² I don't doubt your *confirmation*, but I will telegraph if I see trouble."⁹³ That same evening, however, Beck dashed off an excited note telling Harlan, "I know, don't ask me how[,] that you are to be reported favorably & I [do not] doubt soon will be confirmed. I thought you would like to know that much."⁹⁴

It was one week later when Senator McDonald of the Judiciary Committee announced that the nomination had been reported favorably.⁹⁵ On November 29, 1877, a motion was placed before the executive session of the Senate that the nominations of seventeen persons, one of whom was Harlan, be confirmed.⁹⁶ To this Senator Conkling moved "that the foregoing resolution advising and consenting to the appointment of the persons therein named, respectively, be reconsidered."⁹⁷ Harlan was not singled out for this final gesture of defiance to Hayes. The motion was left pending, but a newspaper account declared "there is good authority for stating that the number of senators opposed to the appointment is small, and that a final favorable action will shortly be voted by a large majority."⁹⁸ Ironically, there is no record of the final disposition, but Beck happily wrote: ". . . Voorhees & I were greatly delighted & went off half cocked. Maxey says say '*unanimously*' because I want him to know I was for him, & I was in a humor to oblige everybody[.] [T]he rules forbid us to tell *what others did*[;] I did not know it. [T]he motion to reconsider, if it does not prevail falls & the confirmation stands [;] & on Monday after 12 P.M. the President will be advised & send the Comm. [Commission] . . . It is all right[;] you can't be beaten. I have seen both sides. . . . I think I can get *all* our side to stand by you. . . ."⁹⁹

92. Ballinger, who had received Miller's support, was from Texas. See note 29 *supra* and accompanying text.

93. Beck to Harlan, November 19, 1877, Harlan Papers, Miscellaneous Correspondence, 1877-1879, University of Louisville Law School, Louisville, Kentucky.

94. *Ibid.* This letter is dated merely "Monday evening." Since this letter seems to be written later than the one dated November 19 (see note 92 *supra*), which is a Monday, and since the Committee did report on the following Monday, November 26, it is probable that this "Monday evening" letter must have been sent on November 19, a few hours later than the dated letter.

95. 21 SEN. J. 1877-1879 139 (1901).

96. *Id.* at 143.

97. *Ibid.*

98. The Indianapolis Sentinel, Nov. 30, 1877, p. 1, col. 3. The story dateline is November 28, 1877.

99. Beck to Harlan, November 30, 1877, Harlan Papers, Miscellaneous Correspondence, 1877-1879, University of Louisville Law School, Louisville, Kentucky.

Senator Maxey of Texas had heretofore withheld his support. See note 92 *supra* and accompanying text.

The dateline of this letter suggests that Harlan's confirmation was not final on November 29. The date on which Conkling's motion to reconsider was either with-

A final look at the record shows that the Radical Republican, Kellogg, contestant for the disputed Louisiana Senate seat, was sworn in within a few hours after Harlan's confirmation.¹⁰⁰ John Harlan, ex-Louisiana Commissioner, ex-candidate for the Governorship of Kentucky, ex-aspirant for the Attorney Generalship of the United States, was sworn as an Associate Justice of the United States Supreme Court on December 10, 1877.¹⁰¹

drawn or defeated is not ascertainable from presently available sources. On December 30 Conkling did, however, withdraw his motion with respect to one of the nominees being reconsidered along with Harlan. See 21 SEN. J. 1877-1879 143, 145 (1901).

100. The Indianapolis Sentinel, Dec. 1, 1877, p. 1, col. 4.

101. See 98 U.S. vi (1878).